

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 19, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1684-CR**

**Cir. Ct. No. 2012CT429**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARY J. KAMUCHEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Jefferson County:  
JACQUELINE R. ERWIN, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.<sup>1</sup> Mary Kamuchey appeals a judgment of conviction for operating a vehicle while intoxicated, as a third offense, in violation of WIS. STAT. § 346.63(1)(a). Kamuchey argues that the circuit court erred in

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

denying her motion to suppress evidence of intoxication obtained from a traffic stop because, she asserts, the officer did not have reasonable suspicion to initiate the stop. I conclude that the officer did have reasonable suspicion and therefore affirm.

## **BACKGROUND**

¶2 The evidence offered at the suppression hearing consisted solely of the testimony from the police officer who stopped Kamuchey's vehicle, Officer Leffler, and she testified as follows.

¶3 Officer Leffler was on duty in the City of Watertown at 1:58 a.m. on October 24, 2012, when she was informed by dispatch that it had received a call from an employee at the Bernard Street McDonald's. The employee stated that a woman driving a silver Subaru at the drive-through was argumentative and refused to take her change, that the employee "smelled or they believed that she was intoxicated," and that the woman was the only person in the vehicle. The employee remained on the phone with dispatch and relayed information to Leffler about the location of the silver Subaru as Leffler tracked the car. Leffler saw a silver Subaru at a stoplight a few hundred yards from the McDonald's drive-through and confirmed with dispatch, with the caller still on the line, that the Subaru was the same vehicle. Leffler was also told by another officer who had arrived at the scene earlier that he saw the same silver Subaru leave McDonald's. That officer activated his emergency lights, and the Subaru pulled over. Leffler approached the Subaru and made contact with the driver, Kamuchey.

¶4 The circuit court concluded that this was a classic *Terry*<sup>2</sup> case in which the officer was presented with a report of the imminent threat of a drunk driver, by an identifiable citizen who called at bar time (the 2:00 a.m. time when bars close and people “leave the bars driving”) about a woman who was acting “bizarrely in refusing to take change,” who smelled of alcohol, and who appeared to be driving drunk. And the information provided by the informant including the identity of the vehicle, the location of the vehicle, and the description and number of occupants, was immediately confirmed by the investigating officer. The circuit court concluded that Officer Leffler had reasonable suspicion to stop Kamuchey based both on the information she had obtained from dispatch concerning the driver of the vehicle, the identity of the vehicle, and the location of the vehicle, and on the threat to public safety posed by that information.

¶5 The circuit denied Kamuchey’s suppression motion, and Kamuchey appeals.

## DISCUSSION

¶6 The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution both protect against unreasonable searches and seizures. To execute a valid investigatory stop consistent with the United States and Wisconsin Constitutions, a law enforcement officer must have reasonable suspicion to believe that a crime or traffic violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. In assessing whether a stop is supported by reasonable

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<sup>2</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

suspicion, we consider whether “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the intrusion of the stop. *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). “However, an officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop.” *State v. Washington*, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305. We determine the reasonableness of a stop based on the totality of facts and circumstances. *Post*, 301 Wis. 2d 1, ¶13.

¶7 When we review a circuit court’s order on a suppression motion, we uphold the circuit court’s factual findings unless they are clearly erroneous. *Id.*, ¶8. However, whether an investigative stop is constitutional based on those facts is a question of law, which we review de novo. *State v. Guzman*, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992).

¶8 In some circumstances, information contained in an informant’s tip may justify an investigative stop. *State v. Rutzinski*, 2001 WI 22, ¶17, 241 Wis. 2d 729, 623 N.W.2d 516. Because informants’ tips vary greatly in reliability, an officer must consider the reliability and content of the tip before it can give rise to grounds for such a stop. *Id.* In assessing a tip’s reliability, we must give due weight to: “(1) the informant’s veracity; and (2) the informant’s basis of knowledge.” *Id.*, ¶18. We view these considerations in light of the totality of the circumstances. Therefore, a deficiency in one consideration may be compensated by a strong showing as to the other. *Id.* An exigency, such as an imminent threat to public safety, can supplement the reliability of an informant’s tip that might otherwise be insufficient to justify an investigative stop. *Id.*, ¶26. Finally, when an ordinary citizen, as opposed to a police informant, is the source of information provided to the police, a more relaxed test of reliability applies that “shifts from a

question of personal reliability to ‘observational’ reliability.” *State v. Williams*, 2001 WI 21, ¶36, 241 Wis. 2d 631, 623 N.W.2d 106 (citations omitted).

¶9 In this case, the citizen informant’s veracity was high. Although the informant did not provide a name, dispatch knew the call was from an employee at McDonald’s and based on the employee’s personal observation. Given this and the other information that the informant gave dispatch, and the fact that the informant remained on the line as officers tracked the subject’s vehicle, the informant would expect that a police officer would in the course of the investigation be able to readily learn his or her identity.

¶10 The basis of the informant’s knowledge was apparent from the information that the call was from a McDonald’s employee who had just served the female subject at the drive-through. The informant also stayed on the phone with dispatch and provided updates on the location of the vehicle. When Officer Leffler saw a vehicle matching the informant’s description of the vehicle and heard from dispatch that the informant confirmed that that vehicle was the vehicle driven by the female subject, it was reasonable for Officer Leffler to believe that that was the vehicle driven by the female subject served by the informant.

¶11 Finally, based on the information provided by the informant, a reasonable officer could infer that, if permitted to continue driving, the female subject posed an imminent threat to public safety. *See Rutzinski*, 241 Wis. 2d 729, ¶34-36. Although Officer Leffler did not observe erratic driving or signs of intoxication herself, she could reasonably rely on the observation reported by the informant of the driver’s erratic behavior and an intoxicated smell. She could also reasonably infer from the call made by the informant that the driver’s condition was of sufficient concern to warrant follow-up.

¶12 Nevertheless, Kamuchey challenges whether the “content” of the information relayed by the informant through dispatch to Officer Leffler was sufficient to establish reasonable suspicion. Kamuchey argues that if the odor of intoxication at 2:00 a.m. is sufficient to establish reasonable suspicion, then “law enforcement would be able to pull people over *carte blanche*.” Kamuchey’s argument fails because it is based on a strained and incomplete view of the evidence in this case.

¶13 Here, the informant provided much more information than an odor of intoxication at bar time. The informant reported a customer who was argumentative and refused to take her change, and who not only smelled of alcohol but appeared to be intoxicated; the informant identified both the subject and number of occupants, one female driver, and the make of the vehicle, a silver Subaru; and the informant continued to track the location of the vehicle as one officer saw it leave McDonald’s and the other officer saw it at the nearby stoplight. Under the totality of the circumstances, the information provided by the informant and Officer Leffler’s confirmation of some of those details through her own observations were sufficient to lead a reasonable officer to suspect that the driver of the silver Subaru was operating the vehicle while under the influence of an intoxicant.

### CONCLUSION

¶14 On the basis of the informant’s tip and her confirmation of some of the details provided by the informant, Officer Leffler had reasonable suspicion to conduct the stop of Kamuchey’s vehicle. Accordingly, I affirm.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS STAT. RULE  
809.23(1)(b)4.

